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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

WALLEN PLAINTIFF,

Plaintiff,

v.

PPG ARCHITECTURAL FINISHES,
INC.,

Defendant.

Case No. 8:18-CV-00705-JVS-JPR

**DEFENDANT PPG
ARCHITECTURAL FINISHES,
INC.'S REPLY IN SUPPORT OF
MOTION FOR SUMMARY
JUDGMENT, OR IN THE
ALTERNATIVE MOTION FOR
SUMMARY ADJUDICATION**

**Judge: Hon. James V. Selna
Hearing Date: November 7, 2022
Time: 1:30 p.m.
Courtroom: 10C**

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I. INTRODUCTION

Plaintiff Wallen Lawson’s forty-three page Opposition fails to create a genuine issue of material fact for three reasons: (1) it is largely devoid of citations to *any evidence*; (2) where evidence is cited, more often than not, the cited evidence is either unsupportive of the fact asserted, or a mischaracterization of the cited evidence; and (3) Plaintiff unpersuasively argues the Court should focus on what a “reasonable jury might conclude” based on speculation and conjecture. Simply put, “[t]he district judge is not required to comb the record to find some reason to deny a motion for summary judgment.” *Forsberg v. Pac. Nw. Bell Tel. Co.*, 840 F.2d 1409, 1418 (9th Cir. 1988); (“Arguments based on conjecture or speculation are insufficient...” *R.W. Beck & Assocs. v. City & Borough of Sitka*, 27 F.3d 1475, 1480 n. 4 (9th Cir.1994).)

Plaintiff’s Opposition repeatedly makes a critical admission that undermines his ability to establish that any protected activity was a contributing factor in PPG’s decision to terminate his employment. Namely, as Plaintiff admits no less than seven times, long before Plaintiff ever engaged in any alleged protected activity, Moore was, according to Plaintiff, grading his Market Walks unfairly and setting him up for failure by realigning his territory. *See e.g.*, Opp., 5:5-9, 5:22-6:6, 7:8-15, 9:1-8, 22:16-21 UMFs, 12, 78. After Moore allegedly should have surmised the existence of an ethics complaint *and* that it was made by Lawson, Lawson actually received a slightly improved Market Walk score from Moore. Indeed, the only adverse employment action that occurred *after* Lawson engaged in protected activity was the result of Lawson’s own failure to meet the PIP’s requirements. Notably, Lawson does not contend he ever met PPG’s expectations. Instead, he argues either PPG’s expectations are unreasonable, or without any comparator evidence, they were inconsistently applied.

Although that alone should be enough, also fatal to Plaintiff’s claims, is that his poor performance started in April 2016, i.e., *more than eight months before* Moore, the alleged bad actor, started managing him, and almost *one full year before*

1 Plaintiff made his first anonymous complaint:

- 2 • April 2016: Plaintiff misses his sales goal
- 3 • June 2016: Plaintiff misses his sales goal
- 4 • October 2016: Plaintiff misses his sales goal
- 5 • November 2016: Plaintiff misses his sales goal
- 6 • December 2016: Plaintiff scored 60/100 (Marginal) on his Market Walk
- 7 • December 2016: Plaintiff misses his sales goal
- 8 • January 2017: Plaintiff misses his sales goal
- 9 • February 2017: Plaintiff misses his sales goal
- 10 • March 2017: Plaintiff scored 58/1100 (Unsuccessful) on his Market Walk
- 11 • March 2017: Plaintiff misses his sales goal
- 12 • Mid-April 2017: Mayhew and Moore discuss placing Plaintiff on a PIP
- 13 • April 21, 2017: Plaintiff scored 46/100 (Unsuccessful) on his Market
- 14 Walk, and discusses with Moore his failing performance.

15 Plaintiff's failure to meet PPG's legitimate expectations of his job continued
16 throughout 2017, and it is undisputed that after Plaintiff was placed on a PIP in May
17 2017, he continued to miss his monthly sales goals and failed to score a "Successful"
18 rating on two consecutive Market Walks. Simply put, aside from the absence of
19 evidence regarding the decision maker's lack of knowledge of Plaintiff's protected
20 activity, there is no doubt that the evidence clearly establishes that PPG would have
21 terminated Plaintiff's employment for legitimate, independent reasons even if he had
22 not engaged in protected activity since that is precisely what happened. As such,
23 summary judgement should be granted.

24 **II. LEGAL ANALYSIS**

25 Contrary to Plaintiff's assertions otherwise, the outcome of this motion, on the
26 record before this Court, was not decided by the Ninth Circuit. To the extent the
27 Ninth Circuit expressed any sentiments about summary judgment, those were done
28 *before* the California Supreme Court had opined, and before the parties and the Ninth

1 Circuit knew which evidentiary standard to apply to a claim under Section 1102.5.
2 Importantly, after the California Supreme Court’s decision in *Lawson*, the Ninth
3 Circuit vacated and remanded this case “to the district court for it to apply the correct
4 framework, as set forth in the California Supreme Court’s opinion, **in the first**
5 **instance.**” Memorandum dated February 9, 2022, Case No. 19-55802, Dkt. 65-1
6 (emphasis added). As the Ninth Circuit noted, this Court “must reevaluate the
7 evidence based on a different legal standard.” *Id.* at fn. 1. Thus, there is no
8 presumption in Plaintiff’s favor or directive from the Ninth Circuit to deny PPG’s
9 motion for summary judgment, and Plaintiff must affirmatively present specific
10 admissible evidence that creates a genuine issue of material fact for trial. Plaintiff has
11 failed to do so. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).

12 **A. Plaintiff has failed to establish that any alleged protected activity**
13 **was a contributing factor in PPG’s decision to terminate his**
14 **employment.**

15 There is no dispute Plaintiff bears the burden of establishing his alleged
16 protected activity was a contributing factor in PPG’s decision to terminate his
17 employment. Irrespective of whether the protected activity is Lawson’s alleged
18 comments to Moore about his alleged refusal to engage in mis-tinting, or his ethics
19 complaints, Lawson cannot meet his burden of proof.

20 Insofar as Plaintiff’s claim is premised on the anonymous complaints to PPG’s
21 ethics hotline pursuant to Labor Code 1102.5(b), it fails because it is undisputed the
22 decision makers– Moore, Mayhew, and Kacsir – had no knowledge Plaintiff
23 submitted any anonymous complaint until *after* he filed this lawsuit. UMF, 77.
24 Plaintiff’s response to UMF 77 is indicative of his Opposition as a whole, i.e., that
25 Plaintiff has no evidence to create *any* genuine dispute of a material fact.¹ More
26 specifically, in response to PPG’s Separate Statement, Plaintiff’s asserts UMF, 77 is
27 “Disputed” and instead of citing to any evidence, he interjects argument to try and

28 ¹ PPG objects to the Horowitz Decl., Exhibits B, C, F, G, H, I, L, S, U, V, W as they have not been
authenticated, and are inadmissible. *See Orr v. Bank of Amer.*, 285 F.3d 764, 773 (9th Cir. 2002)

1 manufacture a dispute on paper.² In fact, there are at least 24 material facts that
2 Plaintiff states are “Disputed”, yet he provides no evidence in support. *See, e.g.,*
3 UMFs, 5, 12, 16, 18, 23, 29, 34, 37, 39, 44, 47, 49, 50, 51, 59, 63, 64, 67, 68, 70, 73,
4 73, 77, 82, 83. *See, S.A. Empresa de Vioacao Aerea Rio Grandense v. Walter Kidde*
5 *& Co.*, 690 F.2d 1235, 1238 (9th Cir. 1982) (“a party cannot manufacture a genuine
6 issue of material fact merely by making assertions in its legal memoranda”), *Southern*
7 *Cal. Gas Co. v. City of Santa Ana*, 336 F.3d 885, 889 (9th Cir. 2003) (party opposing
8 summary judgment must direct the court’s attention to specific, triable facts, general
9 references without page or line numbers are not sufficiently specific); Fed.R.Civ.P
10 56(c)(1)(A) (a party asserting that a fact is genuinely disputed must support the
11 assertion by “citing to particular parts of materials in the record”).

12 With no direct evidence that a decision maker was aware he submitted an
13 anonymous complaint, Plaintiff must rely on unsupported speculation and conjecture,
14 which is insufficient to create a genuine issue of material fact. *See Yartzoff v. Thomas*,
15 809 F.2d 1371, 1376 (9th Cir. 1987)(“causation...may be inferred from circumstantial
16 evidence, such as the employer’s knowledge that the plaintiff engaged in protected
17 activities”); *Morgan v. Regents of University of California*, 88 Cal.App.4th 52, 69-
18 70 (2000) (“**Essential to a causal link is evidence that the employer was aware**
19 **that the plaintiff had engaged in the protected activity.**” (quoting *Cohen v. Fred*
20 *Meyer, 23 Inc.*, 686 F.2d 793, 796 (9th Cir.1982) (emphasis added.)).

21 **1. Plaintiff’s evidence is insufficient to establish a decision**
22 **maker had knowledge of his alleged protected activity.**

23 First, notwithstanding the fact that Duffy was not a decision maker, Plaintiff
24 argues, “Duffy obviously learned [Plaintiff’s] identity when he left a voice mail for
25 [Plaintiff] and heard Lawson’s voice mail greeting”. *Opp.*, at 15, fn. 13. Even if this
26 assumption could be made, there is *no evidence* Duffy shared that information with

27 ² PPG objects to Horowitz Declaration, Exhs. A, J, K, N, O, Q, R, T, and AA on the grounds
28 Plaintiff failed to provide reporter certifications; thus, they lack authentication and personal
knowledge. *See Orr*, 285 F.3d at 774; *Pavone v. Citicorp*, 60 F.Supp.2d 1040, 1045 (S.D.Cal. 1997)

1 anyone, including, Minda, Dalton, Moore, Mayhew, or Kacsir. UMFs 51, 60-61, 77.³
2 In fact, the undisputed evidence shows that after that phone call, Duffy did not know
3 he was speaking to Plaintiff (UMF 50), and Duffy refers to the person he spoke with
4 only as “the reporter” and “the caller,” stating “**The reporter did not provide a**
5 **name – since they were still concerned about remaining anonymous...**” UMF, 51.

6 Second, Plaintiff asserts, “a reasonable jury could conclude that Moore
7 deduced that Lawson was the whistleblower as a result of Lawson’s vehement
8 objections to the mis-tinting practice.” Opp., at 3:16-18. The flaw in this assertion as
9 it relates to Moore’s alleged knowledge that Lawson reported him to PPG is the lack
10 of *any* evidence to support the contentions Moore knew about the April 2017 and
11 June 2017 complaints in the first instance. Indeed, both Dalton and Moore testified
12 that when Dalton met with Moore to discuss questions about the mis-tinting practice,
13 Dalton told Moore the investigation was initiated to review expense-out products.
14 UMFs, 52, 53. The evidence is undisputed that Dalton *never* revealed to Moore that
15 an anonymous complaint had been filed. *Id.* It is unreasonable to infer that Moore
16 had knowledge that Plaintiff made either anonymous report, when it is undisputed
17 that Moore did not know about the reports in the first place.

18 Unable to pin any knowledge of the anonymous complaints on Moore,
19 Mayhew or Kacsir, Lawson shifts his focus to his alleged opposition to Moore in
20 order to try to state a claim under Section 1102.5(c). This is equally unavailing. First,
21 Lawson’s testimony about his alleged opposition to Moore is itself contradictory and
22 questionable. There are no facts in the Second Amended Complaint alleging any
23 statements directly to Moore. Lawson claims that at some point in the week after
24

25 ³ Plaintiff’s citations to Duffy’s testimony highlight blatant mischaracterization of evidence. At
26 deposition, Duffy was *hypothetically* asked if he would have terminated Moore if Moore engaged
27 in unethical behavior while reporting to Duffy; Duffy said he would. Duffy did not testify, “Moore,
28 not Lawson, should have been the one that the company fired.” Opp., 19:12-15. Duffy’s testimony
does not confirm he knew Plaintiff made an anonymous report, or that Moore retaliated against
Plaintiff for *any* reason. Moreover, Moore and Lawson are not comparators, and the undisputed
fact remains Lawson was terminated for performance reasons.

1 April 18, 2017, “he spoke by phone with Moore, who resided in Phoenix and was
2 rarely physically present in Lawson’s territory in California,” (Opp. at 12:10-13) all
3 while ignoring the fact that Lawson had been physically with Moore for a multi-day
4 Market Walk that concluded on April 21, 2017 (Lawson Depo., 69:11-70:17, Exh.
5 9), including on the same day Lawson made his first anonymous complaint. Lawson
6 unequivocally admits he wanted his April 21, 2017, complaint to be anonymous
7 (UMF 34), yet now wants this Court to believe that the very next week he
8 “vociferously” objected directly to Moore, but then two months later, went back to
9 wanting to remain anonymous.

10 In its totality, the evidence does not create a genuine dispute that the decision
11 makers were aware of Lawson’s alleged protected activity.

12 **2. Plaintiff has not met his burden of establishing any protected**
13 **activity was a contributing factor in PPG’s decision to**
terminate his employment.

14 Even if Lawson could prove that Moore, or any other decision maker, was
15 aware of protected activity, Lawson still cannot show the protected activity was a
16 contributing factor in the termination decision. This is true for several reasons.

17 First, Lawson had a long pattern of performance issues predating any alleged
18 protected activity. Lawson had missed his monthly sales numbers eight times
19 between April 2016 and April 2017. UMF 18. Lawson had scored poorly on the
20 December 2016, March 2017, and April 2017 markets walks. UMF 11, 14, 23. After
21 the March 2017 Market Walk, Plaintiff received a verbal warning. UMF 15. Moore
22 and Mayhew discussed placing Lawson on a performance improvement plan. UMFs
23 19, 20. Moore discussed with Lawson his concerns about his performance at the time
24 of the April 2017 Market Walk. UMF 24. From that point forward, it is only
25 Lawson’s inability to meet the expectations of his PIP that leads to his termination.

26 Second, after the alleged protected activity, Plaintiff gets his highest score yet
27 on a Market Walk with Moore. From this, his PIP is extended (which he now says
28 was only done by Moore so that Moore could sabotage another Market Walk to

1 justify a termination). But, hypothetically speaking, if Moore were intentionally
2 retaliating against Plaintiff for engaging in protected activity, logic dictates Moore
3 would have terminated Plaintiff's employment in July 2017 when his Market Walk
4 failed to achieve a required "Successful" rating. Rather, Moore *extended* the PIP, and
5 provided Plaintiff with additional time, and an additional Market Walk to get back
6 on track. UMF, 67. Plaintiff failed to improve, and so he was terminated.

7 Curiously, Lawson alleges that as early as the December 2016 Market Walk,
8 Moore's critique of Lawson's performance is suspect (i.e., Lawson argues Moore
9 was unfairly scoring and critiquing his performance on Market Walks more than five
10 months before any alleged protected activity). *See* Plaintiff's Response to UMFs 16
11 and 23; Opp. at 5:5-9 (Moore scored Lawson's Market Walks...in an anomalous
12 manner inconsistent with company policies in order to generate a low score to justify
13 firing Lawson.); Opp. at 7:8-15 (accusing Moore of arbitrarily targeting Lawson for
14 low scores, and arguing a jury could conclude the decline in scores was caused by
15 Moore's retaliatory animus, ignoring that the first Market Walk after any protected
16 activity was the highest score Lawson received on a Market Walk with Moore). In
17 making this argument, Plaintiff seemingly forgot that in his SAC, he alleged, "Moore
18 proceeded to unfairly score Plaintiff's Market Walk evaluations in order to give him
19 failing scores, **starting with Plaintiff's July 13, 2017 Market Walk.**" SAC, Dkt.
20 37, ¶ 17 (emphasis added). Moreover, Plaintiff alleges, "Moore engaged in the same
21 practice with Plaintiff's final Market Walk in late-August 2017." *Id.* As such,
22 Plaintiff's original allegations in this case were that the first Market Walk he believes
23 Moore unfairly scored was in July 2017, followed by the final August 2017 Market
24 Walk. Since this cannot be rectified with the fact that the July 2017 Market Walk was
25 his highest score under Moore, Plaintiff now contends all of his Market Walks under
26 Moore were unfairly scored. Under this new argument, however, Plaintiff cannot
27 show his protected activity was a contributing factor to his termination because,
28 according to Lawson, Moore was unfairly scoring his Market Walks well before he

1 ever engaged in protected activity.

2 Also fatal to Lawson's ability to establish his burden of proof is his argument
3 that Moore sabotaged his sales numbers by realigning his territory. Although Lawson
4 fails to state when the realignment allegedly occurred, for the realignment to be the
5 justification why he missed his sales goals, it must have occurred immediately after
6 Moore took over the region in January 2017 since Lawson has offered no other
7 excuse for missing his sales goals in January 2017, February 2017, March 2017, April
8 2017, May 2017 and June 2017. Based on that timeline, the "unfair" realignment
9 occurred *before* any protected activity, and further undermines Lawson's argument
10 his later protected activity was a contributing factor to the decision to terminate him.

11 In sum, Plaintiff's inability to accept his performance deficiencies, which long
12 predated any protected activity and carried through to his termination, highlights why
13 the evidence before this Court has not created a genuine issue of material fact.⁴

14 **B. PPG has established by clear and convincing evidence it would have**
15 **terminated Plaintiff's employment for legitimate, independent**
16 **reasons.**

17 Throughout his opposition, Plaintiff repeatedly argues what a "reasonable jury
18 could conclude." However, Plaintiff's argument is a red herring because at this stage,
19 Plaintiff must affirmatively present specific admissible evidence sufficient to create
20 a genuine issue of material fact for trial. *Celotex Corp.*, 477 U.S. at 324. Assuming,
21 *arguendo*, Plaintiff could establish he was retaliated against because he engaged in
22 protected activity (which he cannot do as set forth above), the evidence
23 overwhelmingly establishes that PPG would have terminated Plaintiff's employment
24 for legitimate, independent reasons even if he had not engaged in protected activity.

25 **1. It is undisputed that Plaintiff failed to meet his monthly sales**
26 **goals starting in 2016, and continuing through to his**
27 **termination.**

28 First, Plaintiff does not dispute he only met his monthly sales goals four times

⁴ PPG objects to ¶ 17 of the Lawson Decl. as he lacks personal knowledge of the facts asserted, and it is improper expert opinion. *Villiarimo*, 281 F.3d at 1059 & fn.5, 1061.

1 between April 2016 and March 2017, and he continued to miss them in April 2017,
2 May 2017, and June 2017. For four of the eight misses prior to April 2017, Plaintiff's
3 supervisor was Paul Stanton, not Moore. This evidence emphasizes and confirms
4 Plaintiff's performance issues started long before - i.e., 8 months before - Moore
5 began managing Plaintiff. To minimize the significance of missing his sales goals,
6 Plaintiff argues his failure was due to a territory realignment orchestrated by Moore
7 which "greatly affected Plaintiff's sales metrics, and Moore opportunistically used
8 the resultant lowered sales numbers as justification for [Plaintiff's] PIP and firing."
9 Opp. at 22:16-21. Plaintiff's baseless assertion is unsupported by the record, as his
10 historical failure to meet his monthly sales goals, which started prior to Moore,
11 completely undercuts his credibility, and his assertions Moore realigned Plaintiff's
12 territory to intentionally negatively impact his sales numbers.⁵

13 What is more, Plaintiff provides no evidence (because none exists) that Moore
14 even had authority, input, or discretion over the decisions associated with the
15 realignment. Notably, Plaintiff fails to state when the realignment occurred in relation
16 to his struggling performance, and, although Plaintiff attributes the realignment to
17 Moore, Moore did not assume responsibility for Plaintiff's territory until early 2017.
18 Moore Decl., ¶ 10. Even assuming the realignment occurred on January 1, 2017,
19 Plaintiff already missed his sales goals for at least five months by that point: April
20 2016, June 2016, October 2016, November 2016, and December 2016. UMFs 17, 18.
21 Ultimately, Plaintiff's conclusory statement he was given underperforming stores
22 lacks foundation, as he provides no *evidence* of when or why the stores
23 underperformed and/or later closed. Nor can it excuse his poor performance, because
24 sales goals are set based on the performance *at that store* in the prior year. UMF 4.⁶

25 _____
26 ⁵ Plaintiff offers only his self-serving declaration about the alleged reassignment; his declaration
27 lacks evidentiary support, and does not create a genuine issue of fact. *Villiarimo v. Aloha Island*
28 *Air, Inc.*, 281 F.3d 1054, 1061 (9th Cir. 2002).

⁶ Although Plaintiff contends UMF 4 is "Disputed", there is no evidence why or when any store in
his territory closed, nor is there evidence "Moore removed Plaintiff's top-performing stores from

1 Second, Lawson claims he “missed the alleged goals by only a thin margin.”
2 Opp., at 23:11. Plaintiff’s opinion that his misses were small is irrelevant. *See*
3 *Bradley v. Harcourt, Brace & Co.*, 104 F.3d 267, 270 (9th Cir.1996) (“an employee’s
4 subjective personal judgments of [their] competence alone do not raise a genuine
5 issue of material fact”). PPG, not Plaintiff, determines the essential duties of the job
6 and the weight given those duties. *White v. Home Depot U.S.A.*, 2019 WL 1171163
7 at * 12 (S.D. Cal. 2019) (Courts is not a super-personnel department to reexamine an
8 entity’s business decision).

9 Third, throughout his opposition Plaintiff tries to downplay the sales side of
10 his job, going so far as to call it a “‘fallacy’ that TMs ‘sell’ product in the store.”
11 Plaintiff also contends TMs “were in practice retail merchandizing clerks who has
12 little ability to influence the sales of PPG products in a particular store.” *See*
13 Plaintiff’s Response to UMFs 17, 18, 63. Plaintiff’s self-serving statement is
14 contradicted by Plaintiff’s own prior statements at the time he was employed by PPG.
15 In his 2016 evaluation, Plaintiff noted that he would “develop a blueprint to make
16 [selling product in his territory] happen & **achieve this important goal.**” (emphasis
17 added.) Lawson Decl., ¶ 9, Exh. A. Likewise, Plaintiff also noted that he “did not
18 attain goal struggled in my market **selling** Rescue It line of products.” (emphasis
19 added.) *Id.* These were Plaintiff’s contemporaneous words in 2016, not his attorneys’
20 argument in an effort to defeat summary judgment.

21 Fourth, despite the fact Plaintiff had several years to conduct the appropriate
22 discovery needed to prove PPG unfairly calculated Plaintiff’s sales numbers in
23 comparison to other TMs, or that stores assigned to him when his territory was
24 allegedly realigned caused his misses, or that Moore gave the stores to him to
25 intentionally negatively impact his sales numbers, Plaintiff has failed to do so. This
26 lack of evidence is fatal to Plaintiff’s attempts to undermine the clear and convincing
27

28 his territory and replaced them with failing stores.”

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1 evidence that PPG prioritized sales goals, that PPG was warranted in placing Plaintiff
2 on a PIP in part because of his missed sales goals, and that PPG would (and did)
3 terminate him because he failed to meet the PIP goals, including his sales goals.

4 **2. It is undisputed that Plaintiff failed to achieve “Successful”**
5 **scores on five consecutive Market Walks.**

6 Besides missing his monthly sales goals in eight out of twelve straight months
7 before he was placed on a PIP, and for another three consecutive months thereafter,
8 the evidence is undisputed that Plaintiff failed to achieve a “Successful” score on five
9 consecutive Market Walks. Notably, the final Market Walk in August was only 6
10 points lower than the April 2017 Market Walk; yet Lawson ignores that fact because
11 as of the April 2017 Market Walk, he had not engaged in any protected activity.

12 Moore’s critique of Lawson’s performance on Market Walks is thoroughly
13 documented and dates back to December 2016. As early as December 2016,
14 Plaintiff’s Market Walks demonstrate he struggled with: (1) keeping his Training
15 Roster up to date; (2) developing relationships with key employees at the stores in
16 his territory; and (3) placing product in required areas in the stores in his territory.
17 UMF 12. Plaintiff’s 2016 Performance Review demonstrates that these concerns –
18 and others – were present and known to Plaintiff by February 2017; i.e., two months
19 *before* he was placed on his PIP. Lawson Decl., ¶ 9, Exh. A. (noting in self-comments
20 he was behind on training and some stores were missing training); (acknowledging
21 he did not complete the daily store check list every visit), and (noting he did not
22 complete required monthly email communications, did not conduct monthly Store
23 Manager/ASM review meetings, and was behind on quarterly PSI meetings.)

24 Indeed, in his declaration, Plaintiff *admits* he was required to stock products,
25 visit all of his assigned stores, and conduct trainings. Lawson Decl., ¶ 7. And, as early
26 as December 2016, Plaintiff’s Market Walks show he consistently had issues with
27 the specific duties he concedes he was required to perform, e.g., maintaining an up-
28 to-date Training Roster, developing relationships with key employees, and placing

1 product in required areas throughout the stores in his territory. UMF, 12.

2 To avoid the impact of his Market Walk scores, Lawson makes several
3 unconvincing arguments. First, he alleges his near passing score of 66 on his July
4 Market Walk was “not a decisive failure that would have justified termination” and
5 so “Moore extended the PIP to allow himself time to concoct Lawson’s lowest score
6 ever - 40...” Opp. 31:22-28. Besides not having any evidentiary support, this
7 assertion is nonsense. Lawson was on a PIP at the time of the July 2017 Market Walk,
8 the PIP required Lawson obtain a Successful score on the Market Walk, according to
9 Lawson, Moore was aware at that point Lawson had engaged in protected activity;
10 yet, despite some allegedly retaliatory animus, Moore gave Lawson his highest rating
11 ever (knowing it was not enough to meet the PIP requirements) only to extend the
12 PIP for another month to do another Market Walk which he could score lower. While
13 a non-moving party is entitled to inferences, those inferences must be reasonable and
14 supported by the evidence. *Sangster v. Paetkau*, 68 Cal.App.4th 151, 162-63 (1998)
15 (“evidence that gives rise to no more than mere speculation cannot be regarded as
16 substantial, and is insufficient to establish a triable issue of fact.”). The inferences
17 Lawson wants this Court to make require it to oscillate between Lawson’s conspiracy
18 theories accepting some as true for one point, and others as true for another point.

19 Second, Plaintiff claims Moore scored his Market Walks inconsistently with
20 other TMs and/or PPG policy, yet offers no *evidence* to support his speculation.
21 Indeed, when this Court originally examined the evidence when it granted PPG’s
22 motion for summary judgment, it held: 1) “**the record makes clear** Plaintiff
23 consistently performed poorly on his Market Walks”; “Plaintiff also **fails to offer**
24 **evidence** that RSM Moore’s purported deviations violated some well-established
25 company policy or practice”, and that “Plaintiff offers **no evidence** that these alleged
26 ‘inconsistencies’ or deviations impacted Plaintiff’s Market Walk score in an outcome
27 determinative way”. Dkt. 62, at p. 8. Similarly, Lawson argues Moore penalized
28 Lawson in his August 2017 Market Walk score because he did not engage in the mis-

1 tinting practice. Lawson relies on a sentence in a write up that was issued to Moore
2 and Brian Wells that instructs that “all Market Walks need to be conducted and points
3 allocated as appropriate, you should not imply or give “points off” for not giving the
4 store credit on old label product and/or not mis-tinting.” Lawson’s argument is
5 unsupported for multiple reasons. First, there is no evidence Moore had scored
6 Market Walks in that manner (i.e. had taken points off if a TM did not mis-tint); and,
7 second, if that was Moore’s practice, there is no evidence he applied it to Lawson at
8 all, or inconsistent with how he scored others – including Laura Sanchez who had
9 declared she would not mis-tint.

10 **3. Plaintiff admits his Training Rosters contained Inaccuracies.**

11 Plaintiff also alleges, “PPG cannot prove at this stage that it would have fired
12 Lawson for its stated reason - his Market Walk scores and purported “falsification”
13 of his training roster – even if Lawson had not been a whistleblower.” Opp., 36:3-6.
14 Although Plaintiff adamantly denies he “falsified” his training roster, his denial is
15 simply semantics as he admits he submitted inaccurate information and, as a result,
16 sometimes his Training Rosters were wrong. UMF, 80. The testimony Plaintiff cites
17 to support his contention that UMF, 80 is “Disputed” only confirms he never
18 explicitly told to Mayhew - “I falsified documents.” Regardless of the terminology,
19 the undisputed evidence confirms the outcome is the same – Plaintiff’s Training
20 Roster contained inaccuracies. UMF, 81. Indeed, as Plaintiff admitted, his Training
21 Roster issues date as far back as his December 2016 Market Walk, which predates
22 any of his alleged technology issues. Lawson Decl., ¶ 9, Exh. A; *see also*, UMFs 11,
23 14, 23, 64, and 69. (December 2016: Training Roster “[n]eeds to update on “every
24 visit” to ensure that all associates are accounted for and input correctly.”; March
25 2017: Plaintiff failed to update his Training Roster on every visit with current
26 employees, and he failed to have stores in his territory on his Training Roster at all;
27 April 2017: Training Roster submitted shortly after the April 2017 Market Walk had
28 inaccuracies, and it did not have all members of the paint and pro department at

1 Lowe's on the Training Roster; July 2017: "Training roster was missing 2 associates
2 in the paint department in 758. We cannot get a reading of training completion if all
3 associates are not present. Please make sure to ask associates at the end of all shifts
4 if the roster is still the same."; August 2017: Training Roster did not reflect trainings
5 that were allegedly completed, was missing numerous paint and pro department
6 employees, and recorded completed trainings in stores when Lawson was not
7 working in that particular store).

8 Ultimately, as the District Court previously concluded, "the PIP's very terms
9 encompassed [Plaintiff's] overall performance as a TM, including improving
10 [Plaintiff's] sales numbers *and* [Plaintiff's] Market Walk scores" Dkt. 62, at p. 9,
11 (emphasis in original)), however, once on the PIP, Plaintiff continued to struggle with
12 *both* his Market Walks *and* his sales performance. UMFs 63, 64, 69.⁷

13 **C. Plaintiff's claim for punitive damages fails because Plaintiff cannot**
14 **show by clear and convincing evidence that an officer, director, or**
15 **managing agent acted with fraud, malice or oppression.**

16 Punitive damages are only available where a plaintiff can show there is clear
17 and convincing evidence that an "officer, director, or managing agent" of the
18 company is guilty of "oppression, fraud, or malice". Cal. Civ. Code § 3294; *Basich*
19 *v. Allstate Ins.*, 87 Cal. App. 4th 1112, 1118-19 (2001); *Mock v. Mich. Millers Mut.*
20 *Ins.*, 4 Cal. App. 4th 306, 332-33 (1992) (requiring "evidence be so clear as to leave
21 no substantial doubt" and "sufficiently strong to command the unhesitating assent of
22 every reasonable mind"). The California Supreme Court defined a managing agent
23 as someone who "exercises substantial discretionary authority over decisions that
24 ultimately determine corporate policy." *White v. Ultramar*, 21 Cal.4th 563, 573
25 (1999). "Corporate policy" is "the general principles which guide a corporation, or
26 rules intended to be followed consistently over time in corporate operations."

27 ⁷ Plaintiff claims Minda (a) knew he engaged in protected activity, and (b) "failed to take steps to
28 exercise any oversight surrounding Moore's firing of Lawson" Opp., at 25:4-9. Consistent with his
Opposition, Plaintiff fails to provide any evidence Minda deviated from executing her job duties,
or more critically that Plaintiff was retaliated against because he engaged in protected activity.

1 *Cruz v. HomeBase*, 83 Cal. App. 4th 160, 165 (2000).

2 Summary adjudication should be granted on Plaintiff's claim for punitive
3 damages because Plaintiff fails to identify an officer, director, or managing agent that
4 acted with "oppression, fraud, or malice" toward Plaintiff. The SAC alleges only
5 actions by Mayhew and Moore. SAC, *passim*. Plaintiff has no evidence either were
6 an officer or managing director; this alone is fatal to his claim for punitive damages.
7 *See White v. Ultramar*, 21 Cal.4th 563, 577 (1999); *Cruz v. Homebase*, 83
8 Cal.App.4th 160,167-168 (2000).

9 Also, as to "oppression, fraud, or malice", despite deposing seven PPG
10 employees – Dalton, Duffy, Moore, Kacsir, Mayhew, Minda, and Cathie McKinley
11 – Plaintiff has not identified *any* evidence, let alone clear and convincing evidence,
12 that anyone at PPG acted with oppression, fraud, or malice, i.e., there is no evidence
13 of conduct by anyone at PPG that constitutes an act "so vile, base, contemptible,
14 miserable, wretched, or loathsome" so as to be "despised by ordinary decent people."
15 *Mock, supra*, 4 Cal. App. 4th at 331. As to Moore, the alleged bad actor, it is
16 undisputed that Moore harbored no ill-will towards Plaintiff. *SUF*, 83.

17 Furthermore, to the extent Plaintiff relies on Moore being the "bad actor"
18 whose actions allegedly warrant punitive damages, Plaintiff has failed to show that
19 Moore was a managing agent. A supervisor with "immediate and direct control" and
20 "the authority to terminate" employees does not necessarily qualify as a managing
21 agent under section 3294. *See Kelly-Zurian v. Wohl Shoe Co.*, 22 Cal. App. 4th 397,
22 422 (1994). Rather, Plaintiff must show Moore "exercise[d] substantial discretionary
23 authority over decisions that ultimately determine corporate policy". Plaintiff failed
24 to identify any such evidence as to Moore, or anyone else at PPG.

25 Accordingly, Plaintiff's claim for punitive damages fails as a matter of law.

26 **III. CONCLUSION**

27 For the reasons stated above PPG respectfully requests that the Court grant its
28 motion for summary judgment in full.

1 Dated: October 14, 2022
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/s/ Karin M. Cogbill
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